No. 42242-5-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Donald Carner, Jr.,

Appellant.

Grays Harbor County Superior Court Cause No. 10-1-00506-7

The Honorable Judge Gordon Godfrey

Appellant's Reply Brief

Jodi R. Backlund
Manek R. Mistry
Attorneys for Appellant

BACKLUND & MISTRY
P.O. Box 6490
Olympia, WA 98507
(360) 339-4870
backlundmistry@gmail.com

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ARGUMENT

I. THE SEARCH WARRANT WAS OVERBROAD AND CANNOT BE SAVED BY THE DOCTRINE OF SEVERABILITY.

A search warrant must be based on facts establishing probable cause. *State v. Young*, 123 Wash.2d 173, 195, 867 P.2d 593 (1994). A search warrant must also describe the things to be seized with particularity. *State v. Riley*, 121 Wash.2d 22, 27-29, 846 P.2d 1365 (1993). The particularity and probable cause requirements are inextricably interwoven. *State v. Perrone,* 119 Wash.2d 538, 545, 834 P.2d 611 (1992).

Search warrant affidavits must establish probable cause *for each item to be seized.*[1] *Id, at* 545-546. Where materials protected by the First Amendment are sought, the affidavit and warrant must be closely scrutinized to ensure compliance with these rules. *Id, at* 547; *Zurcher v. Stanford Daily,* 436 U.S. 547, 564, 98 S.Ct. 1970, 56 L.Ed.2d 525 (1978); *Stanford v. Texas,* 379 U.S. 476, 485, 85 S.Ct. 506, 13 L.Ed.2d 431 (1965)).

Here—as Respondent acknowledges—the police lacked probable cause to search for the majority of items listed in the warrant. *See* Brief of

[1] In this way, general warrants are avoided.

Respondent, pp. 10-12 ("The admittedly invalid portion of the search warrant..."). At most, the affidavit established probable cause for heroin, packaging, cash, two firearms, and a single telephone; despite this, the warrant authorized police to search for and seize

> personal computers together with peripheral devices attached thereto and records contained therein in any manner such as removable digital storage media (thumb drive/flash drive); compact disks, and the like... Indicia of domain [sic] or control over the defendant [sic] premises, records of income, e.g., banking records and statements describing loans and payments thereof, deposits, and withdrawals; emails; [i]nternet browsing records... video tapes, and still photographs; cell phones and cell phone records; letters and crib sheets; and weapons... [E]vidence of unexplained wealth, to include but not limited to monies, personal property, stocks, bonds, savings certificates, and [the] like.
> CP 43-44.

The warrant was overbroad (1) because it authorized police to search for a vast trove of materials for which the affidavit did not establish probable cause, (2) because it failed to describe the items to be seized with the particularity spelled out in the affidavit, and (3) because it failed to describe items protected by the First Amendment with scrupulous exactitude. *Stanford, at* 485; *Perrone, at* 545. The warrant can be described as a general warrant, because of the breadth of the authorization and the absence of particularity. *See Perrone, at* 545.

The severability doctrine (upon which Respondent relies to save valid portions of the warrant) "does not apply in every case." *Perrone*, at

556. Instead, "[w]here a search warrant is found to be an unconstitutional general warrant, the invalidity due to unlimited language of the warrant taints all items seized without regard to whether they were specifically named in the warrant." *Id.* Because the warrant here was an illegal general warrant, the severability doctrine does not apply. *Id.*

There is another reason the severability doctrine cannot be applied: severance is not available when the valid portion of the warrant is relatively insignificant compared to the balance of the warrant. *Id, at* 557. Here, as Respondent admits, the warrant described only "five items for which probable cause existed." Brief of Respondent, p. 11.[2] Contrary to Respondent's assertion, these five items are relatively insignificant compared to the broad categories of property and information for which the warrant authorized police to search.[3] CP 43-44.

Furthermore, even if the doctrine were applied, it could not save this warrant. Under the Fourth Amendment, severance is permitted only "where 'each of the categories of items to be seized describes distinct subject matter in language not linked to language of other categories…'"

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[2] Respondent lists these five items as drugs, paraphernalia, the firearms, cash, and "indicia." Brief of Respondent, p. 11. Respondent apparently concedes an absence of probable cause to search for the remaining items.

[3] Respondent also notes that the police "only" seized 8 items for which they lacked probable cause. Brief of Respondent, p. 11. Respondent's observation—even if fair—is irrelevant: Proper execution of a search cannot cure an overbroad warrant. *Riley, at* 29.

Cassady v. Goering, 567 F.3d 628, 638 (10th Cir. 2009) (quoting *United States v. Sells,* 463 F.3d 1148, 1158 (10th Cir.2006)). The warrant in this case fails that test, because in order to save those portions Respondent claims are valid, a reviewing court would have to pluck certain phrases from the middle of paragraphs to save the warrant. For example, ignoring the particularity problems posed by the paragraph quoted above, severing the valid portions from the remainder would require editing like this:

> ~~personal computers together with peripheral devices attached thereto and records contained therein in any manner such as removable digital storage media (thumb drive/flash drive); compact disks, and the like…~~ Indicia of domain [sic] or control over the defendant [sic] premises, ~~records of income, e.g., banking records and statements describing loans and payments thereof, deposits, and withdrawals; emails; [i]nternet browsing records… video tapes, and still photographs; cell phones and cell phone records; letters and crib sheets; and~~ weapons… ~~[E]vidence of unexplained wealth, to include but not limited to~~ monies~~, personal property, stocks, bonds, savings certificates, and [the] like~~.

This is exactly the kind of torturous editing forbidden by the court in *Perrone.* As in that case, "It is strictly a pick and choose endeavor." *Id, at* 560.

The search warrant was overbroad, and cannot be saved by severing those few valid portions from the remainder. Mr. Carner's conviction must be reversed and the case dismissed. *Perrone, supra.*

II. THE TRIAL JUDGE SHOULD HAVE HELD A *FRANKS* HEARING.

A material omission in an application for a search warrant may invalidate the warrant. *Franks v. Delaware,* 438 U.S. 154, 155–56, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978); *State v. Chenoweth*, 160 Wash.2d 454, 462, 158 P.3d 595 (2007). A *Franks* hearing must be held upon a substantial preliminary showing of a material omission made with reckless disregard for the truth. *Franks, at* 155-156; *see also Chenoweth, at* 462, 478-479.

Here, the affiant neglected to mention the informant's five convictions for crimes of dishonesty (including two felony convictions). CP 14-20. There was ample evidence that the omission was reckless, given the officers' familiarity with the informant's background.[4] CP 17. Respondent's primary argument is that an informant's criminal history is not material to a determination of probable cause. Brief of Respondent, p. 6 ("Bitar's criminal history was immaterial to the issue of probable cause.")

This is incorrect.

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[4] Without citation to the record, and without reference to Mr. Carner's argument in the Opening Brief, Respondent asserts that "no showing has been made that the omission of the [informant's] criminal history was… [made] with reckless disregard for the truth." Brief of Respondent, p. 9. Mr. Carner did make such a showing. *See* Appellant's Opening Brief, pp. 20-21. Furthermore, a *Franks* hearing is held (in part) for the purpose of developing a record of the affiant's recklessness; to obtain such a hearing, the accused person need only make a substantial preliminary showing on the subject. *Franks, at* 155-156.

As the Ninth Circuit Court of Appeals has noted,

> Any crime involving dishonesty necessarily has an adverse effect on an informant's credibility. In the absence of countervailing evidence to bolster the informant's credibility or the reliability of the tip, an informant's criminal past involving dishonesty is fatal to the reliability of the informant's information, and his/her testimony cannot support probable cause.

United States v. Reeves, 210 F.3d 1041, 1045 (9th Cir. 2000).

Mr. Carner alleged sufficient facts to require a *Franks* hearing. Because the affiant recklessly omitted material facts, Mr. Carner's conviction must be reversed. *Id.*

III. IF MR. CARNER'S OVERBREADTH ARGUMENT IS NOT PRESERVED, HE WAS DEPRIVED OF THE EFFECTIVE ASSISTANCE OF COUNSEL.

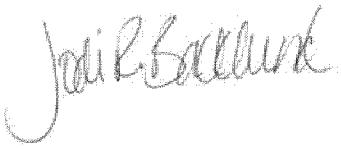
Mr. Carner rests on the argument set forth in his Opening Brief.

CONCLUSION

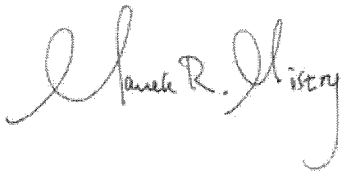
The evidence must be suppressed, the conviction overturned, and the case dismissed.

Respectfully submitted on April 23, 2012.

BACKLUND AND MISTRY



Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant



Manek R. Mistry, WSBA No. 22922
Attorney for the Appellant

CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Reply Brief, postage prepaid, to:

Donald Carner, Jr.
520 W Huntley
Aberdeen, WA 98520

And to:

Grays Harbor Co Prosecutor
102 W Broadway Ave Rm 102
Montesano WA 98563-3621

I filed the Appellant's Reply Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on April 23, 2012.

Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant

BACKLUND & MISTRY

April 23, 2012 - 10:22 AM

Transmittal Letter

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